To give an example. After a motor-car accident the plan would show, besides the permanent features, the vehicle or vehicles if still *in situ* and any other features still apparent, such as wheel marks, etc.

On the other hand, he should not add such things as the position of a vehicle not *in situ* or where witnesses are alleged to have been standing.

A key is unobjectionable if it assists identification of features properly on the plan. It should not contain anything in addition.

It is realised that many witnesses cannot point out anything on a plan unless the point to be pointed has been previously marked with some letter or other mark. It is considered that the addition of such marks has all the objectionable characteristics of leading questions and that identification obtained with such assistance has no value as evidence.

Ruled Accordingly.

SINO-BRITISH ENGINEERING CORPORATION (Malaya) LTD. v. M. A. NAMAZIE LTD.

[Court of Appeal (Evans, Brown and Gordon-Smith, JJ.)
August 11, 1949]

[Singapore — Civil Appeal No. 13 of 1949]

This was an appeal from the judgment of the learned Chief Justice on a claim in contract brought by the appellants against the respondents. The question at issue was as to the proper construction of a paragraph of the appellants' letter to the respondents, which was confirmed by the respondents: "In the event of Bangkok not being interested we will sell locally or elsewhere and in the unlikely event of the lot not being disposed of by the time your next shipment arrives about a couple of months later, you will agree to take it over from us at landed cost." It was argued for the appellants (1) that there was an implied term that the respondents were under an obligation to do nothing to prevent the arrival of their next shipment about a couple of months later upon which the appellants' right depended and (2) that the arrival of the next shipment was a condition precedent to the appellants' right to have the cement taken back, and that although there may have been no obligation on the part of the respondents to see that the condition was fulfilled there was an obligation on them to see that the appellants were not damnified if the condition was not fulfilled.

Held, (1) that no term can be implied which is not necessary to the express contract and would manifestly have been assented to if propounded; (2) that in this case no such term, as contended for by the appellants, could be read into or implied from the contract and therefore the appeal must be dismissed.

Cases referred to:—

(1) *Tancred Arroll v. Steel Company of Scotland* (1890) 15 A.C. 125.
(2) *In re Harrison & Micks Lambert Co.* (1917) 1 K.B. 755.
(3) *Hotham v. East India Company* (1787) 99 E.R. 1295.
(4) *Mackay v. Dick* (1881) 6 A.C. 251.
(5) *Kleinert v. Abosso* (1913) 58 S.J. 45.
(6) *Colley v. Overseas Exporters* (1921) 3 K.B.D. 302.
(7) *Dodd v. Churton* (1897) 1 Q.B. 562.
(8) *MacKay v. Dick* (1881) 6 A.C. 251 at p. 263.

CIVIL APPEAL.

Dr. C. H. Withers-Payne for the Appellants.

Sir Roland Braddell (*R. H. Green* with him) for the Respondents.

Evans, J. : — This is an appeal from a judgment of the learned Chief Justice on a claim in contract brought by the appellants against the defendants. That claim was based on an agreement alleged to be contained in a written contract of 16th April 1946 and a letter from the plaintiffs to the defendants of 17th April which letter is said to be confirmed by the defendants on 20th April. This letter is noted "We confirm M. A. Namazie Limited M. J. Namazie Director." A letter of 18th April from the defendants to plaintiffs in answer to that of 17th was also put in evidence.

The contract is one for the sale by the defendants to the plaintiffs of 1,200 tons of Indian cement, and the letter contains terms attached to that contract. The goods under the contract were duly delivered and accepted by the plaintiffs.

The Chief Justice held that the case depended on the construction of one paragraph of the letter. That paragraph reads as follows:—

> In event of Bangkok not being interested we will sell locally or elsewhere and in the very unlikely event of the lot not being disposed of by the time your next shipment arrives about a couple of months later, you will agree to take it over from us at landed cost.

The Chief Justice held, and the facts are not disputed, that "The plaintiffs did not succeed in disposing of a large quantity of the cement at the contract price and ultimately had to dispose of the balance at a considerable loss. The defendants refused to buy back the cement when called upon to do so. No subsequent shipment of Indian cement was received by the defendants, though they did receive shipments of other goods. The question at issue is whether the defendants were under an obligation to buy back the cement.

"The plaintiffs contend in the affirmative and put their case on two grounds." — The first point has been dropped and we need not consider it further — "Their second contention is that the words of the fourth paragraph import an obligation on the part of the defendants to import more Indian cement."

The appellant appeals against this part of the judgment and bases his appeal on two arguments.

In the first place he says the learned Chief Justice has ignored the words "about a couple of months later" and read the paragraph as if these were omitted. He has taken the event on which the undertaking to re-purchase is to become operative as the arrival of the next shipment of Indian cement, whereas the paramount words are those as to time and the undertaking is to take effect after the lapse of a time certain or, he says, of a reasonable time. What is a reasonable time to re-purchase goods sold and delivered he does not specify, but asks the Court to fix.

Secondly he argued that the resale was on a condition precedent which the defendants had not performed. In his grounds of appeal he pleaded "there was an implied term that they would do nothing to prevent the happening of an event upon which the Appellants' right.....was to arise; and that by preventing in fact the happening of that event; to wit not making the next shipment contemplated, the Respondents discharged the condition upon which the rights of the Appellants were expectant." In the course of argument he contended that there is an implied term in every contract that each party should do everything necessary to be done on his part, and if performance is prevented by the act or default of one party the other is discharged from his obligation; and finally that his action is based on an obligation on the defendant to see that his client was not damnified by any failure to perform the condition. I understood from all this that he relied on an implied condition precedent. Sir Roland Braddell clearly understood him in the same sense as he repeatedly asserted that there is no express condition, and his argument and authorities were directed to show that such condition should not be lightly implied. In his final contentions however the appellant went so far as to urge that the condition is express.

On this ground both points are matters of construction. The letter of 18th April varies that of 17th, but the subsequent signature on the 20th implies that that letter is not merely an offer but embodies the terms of the contract entered into by the signatories together with the letter of 16th which although not specifically referred to must be taken as the matter confirmed. This being so there are no circumstances which would require or permit me to consider extraneous evidence.

The first point turns on the words "about a couple of months later". These words clearly define "arrives". They are not a second or alternative method of fixing the time when the undertaking is to take effect. It is doubtless desirable to give as far as possible meaning to all the words used. I have no doubt that these words as those earlier ones in the same paragraph "very unlikely "are merely the expression of a former and incorrect expectation. The document is not a legal one or drawn with precision. Even were these words regarded as an alternative reckoning, and in course of time at variance with the other words, so that one must be followed and the other ignored, I think the dominant words are "by the time your next shipment arrives". On this point Mr. Payne referred to *Tancred Arroll v. Steel Company of Scotland*[1] and *In re Harrison & Micks, Lambert Co.*[2] and pointed out that in each the contract was referring to quantities of material. These were contracts of very different drafting and extent from this. Other decisions on written contracts are peculiar to those contracts, but the distinction suggested seems to me of little importance. The decisions would seem rather to rest on the obvious consideration that where parties employ numerical terms capable of mathematical preciseness and fail to avail themselves of that precision it is because they do not attach paramount importance to that term or regard it as an essential definition.

There is no provision for re-purchase after a reasonable or any time but on the happening of a definite event. The terms of the letter can only be read as a series of stipulations put forward by the appellants for the protection of the markets on which they hope to sell, and for that purpose and to that extent only to limit where necessary the respondents' liberty of action. It is manifest there is no express condition precedent to import, or to refrain from any act which might prevent importation whatever that could mean. The undertaking is contingent only. The respondent has not exposed them to the risk against which they provided and the fact that they provided against an act which might only tend to expose them to the risk does not alter the purpose of the term.

It may be I misunderstood the appellant's final contentions. His principal argument, and the express

terms of his pleading, allege an implied condition only. On this argument he referred to *Hotham v. East India Company*[3], *Mackay v. Dick*[4] and *Kleinert v. Abosso*[5] and sought to distinguish *Colley v. Overseas Exporters*[6] but this last and *Dodd v. Churton*[7] are in my opinion irrelevant here. In all these cases there was an express and positive undertaking by the defendant to do some act. The shadowy nature of the term to be implied may be gathered from the varied and vague modes of setting it out above. Nor is it made clearer by Counsel declining to discuss the matter in other terms than his own. For myself I can ascribe no meaning to a person doing nothing, nor understand how doing nothing can effect anything. Nor can a negative undertaking come within the wide words of Lord Blackburn[8] under which the appellant sought refuge :—

> Where in a written contract it appears that both parties have agreed that something **shall be done**, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.

The event contemplated, as defined in appellant's own pleading, is "making the next shipment contemplated." Nor is any shipment of cement in question, but a shipment by defendants. Such language as "to do nothing to prevent the next shipment coming forward" is, to me, meaningless. Shipment of cement is not a natural process and shipment by defendant of cement is only procured by his shipping it. This might be the subject of a positive undertaking, but it would, still, not come within Lord Blackburn's words as no concurrence is required. The purpose, however, of the contract was neither to procure further shipments nor the redemption of cement.

The appellant's case is virtually for failure to ship cement. It is clear there is no express undertaking to ship, and that such undertaking might have been but was not included. In truth the only proper implication is that it was intentionally omitted.

No term can be implied which is not necessary to the express contract and would manifestly have been assented to if propounded. I cannot imagine for a moment that the respondent here would have assented to any term either to ship cement or to refrain from any act likely to prevent it coming forward, but would at once have said, he was not prepared to bind himself as far as that, but would safeguard the appellant's interest should he do so.

On a question of an implied condition we may properly have regard to the circumstances of the formation of the contract. Of these the most important is the intervening letter of 18th April which goes to confirm the view expressed above as to the nature of the letter of 17th April and to shew that the respondents understood it in this sense. This letter shows a willingness to protect the appellant from competition but not to the extent stipulated in the letter of 17th April.

The appellants seem to me totally to misunderstand the nature of the contingency here contemplated. The condition is similar to that in a bond, and should such arguments become more popular one might expect the Colonial Treasurer to proceed against offenders released on their own recognisance for behaving themselves and thus disappointing him of the sum for which they are bound. Nor could the claimant alter the character of behaving by describing it as preventing himself from misbehaving, or as doing nothing to misbehave. It is impossible to read into this letter an undertaking on the part of the person to whom it is addressed to safeguard his purchaser from all loss on resale, for which the clearest language would be necessary, but from loss which might result from his own acts. The Chief Justice's judgment is in my opinion clearly correct and the appeal is dismissed with costs.

Brown, J. : — This appeal raises a question of the proper construction of paragraph 4 of the appellants' letter to the respondents dated 17th April 1946, which reads as follows: —

> In the event of Bangkok not being interested we will sell locally or elsewhere and in the very unlikely event of the lot not being disposed of by the time your next shipment arrives about a couple of months later, you will agree to take it over from us at landed cost.

The first point made by Dr. Withers Payne, for the appellants, was that the learned Chief Justice had so emphasized the words "by the time your next shipment arrives" that he in fact altered the contract by ignoring the words "about a couple of months later." On the other hand it seemed to me that Dr. Withers Payne, when he said that the parties intended that the risk of carrying the goods should be transferred to the respondents in about a couple of months, so emphasized the "couple of months" that he tended to ignore "the shipment." No discrimination in emphasis is to be made between the two expressions, and both must carry equal weight. The respondents were agreeing to buy back the cement if the appellants failed to dispose

of it (a) by the time the respondents' next shipment of cement arrived and (b) if it arrived in about a couple of months.

Next we were asked to hold that there is an implied term that the respondents were under an obligation to do nothing to prevent the arrival of their next shipment, about a couple of months later, upon which the appellant's right depended. I think it is abundantly clear that no such obligation can be implied. It appears from the notes of evidence that at some time there was a glut on the market. It is not clear from the notes when the market began to fall, and we are told that at the time when the contract was made the market was not overstocked. But the appellants were placing this order for 1,200 tons of cement without having found a buyer for it, and it was to be delivered with a further 1,000 tons from a previous order, making 2,200 tons in all. If they were unable to dispose of it before the respondents' next shipment arrived, their chances of disposing of it after it arrived, when the market would be further stocked by the cement from the next shipment, would be considerably reduced. It seems to me that nothing is less likely than that the appellants desired to impose upon the respondents a contractual obligation to secure the arrival of the next shipment of cement in two months' time. But if it had to arrive they wanted to protect themselves against the possibility of being caught with the 1,200 tons still on their hands. We have no right to imply into this contract the obligation which is contended for unless we can say that it is a necessary implication that the parties must have intended that obligation to exist. In the light of the facts I think that such an implication is in no way reasonable; still less is it necessary.

Lastly it was argued that the arrival of the next shipment was a condition precedent to the appellants' right to have the cement taken back, and that although there may have been no obligation on the part of the respondents to see that the condition was fulfilled there was an obligation on them to see that the appellants were not damnified if the condition was not fulfilled. I find some difficulty in appreciating the distinction between this proposition and the previous one. You may call it a condition precedent, but it was a condition which only the respondents could fulfil. If they are to be liable because it was not fulfilled that seems to mean in effect that they were under an obligation to fulfil it, and we are back where we were. The principle which is contained in the cases cited on behalf of the appellants is that where one party to a contract is prevented from performing it by the act of the other party, he is not liable for that default. But the principle has no application in this case for two reasons. Firstly, it was not a term of the contract that the defendants were under an obligation to secure the arrival of the next shipment, and it is quite clear that no such obligation can be implied. Secondly, there was in this case no obligation on the part of the appellants which they were prevented from performing by the respondents' failure to bring the next shipment. The arrival of the next shipment about a couple of months later was an event upon which the appellants' right depended, and it did not take place.

In my opinion the appeal must be dismissed with costs.

Mr. Justice Gordon-Smith did not write any judgment but concurred with Evans and Brown JJ.

Appeal Dismissed.

M. ISMAIL v. MAHADEO YADAU.

[Orig. Civ. Juris. (Brown, J.) August 23, 1949]

[Singapore — Civil Suit No. 209 of 1949]

Landlord and Tenant — Who is a lodger.

Held, a person who occupies a somewhat restricted space in a room which he shares with others and pays rent is only a lodger.

CIVIL SUIT.

Eric Choa for the Plaintiff.

S. Shunmugam for the Defendant.

The facts of the case and the arguments sufficiently appear from the Oral Judgment of Brown, J. :—

In para. 3 of the Defence it is stated that since August 1947 the defendant has been residing in the front portion of the first floor of No. 10 Rowell Road *as one of the sub-tenants of the plaintiff* along with one Ram Naresh and six others with the knowledge and consent of the plaintiff. Thus his case upon his pleading is that he is a sub-tenant of the plaintiff. But his case in Court was that he was a sub-tenant of Ram Naresh.

The plaintiff is the tenant of the whole house. In March 1947 he sub-let the front portion of the 1st floor to Ram Naresh. The defendant's case is that in July 1947 Ram Naresh sub-sub-let a small part of this portion of the 1st floor to him. The "portion of